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75-477

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1975

JACK B. COMBS, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the Court of Appeals, Sixth Circuit

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JACK B. COMBS, Petitioner

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UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit

## INTRODUCTION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Sixth Circuit, entered on July 23, 1975.

## OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix A hereto, and is unreported.

## JURISDICTION

By indictment filed March 27, 1973, in the United States District Court, Eastern District of

Kentucky, appellant was charged with a violation of Title 18, Section 1010, United States Code. A guilty verdict was entered on May 14, 1973 and sentence was imposed of one year, one day, to be served, and a fine imposed of $2,000.00. A Notice of Appeal to the Court of Appeals, Sixth Circuit was filed on May 13, 1973. On July 23, 1975, judgment was entered by the Court of Appeal affirming the judgment of the District Court. Appellant filed a Petition for Rehearing in the Court of Appeal on August 6, 1975. Said Petition for Rehearing was denied on September 15, 1975. This Petition for Writ of Certiorari is made pursuant to 28 United States Code, Section 1254(1).

## QUESTIONS PRESENTED

DID THE UNNECESSARY DELAY OF FOUR YEARS FROM THE DATE OF THE OFFENSE TO INDICTMENT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS?

DID THE GOVERNMENT DENY APPELLANT A FAIR TRIAL BY FAILING TO PROVE BY SUFFICIENT EVIDENCE THE REQUIRED

INTENT?

DID THE SENTENCING PROCEDURE DENY APPELLANT FUNDAMENTAL FAIRNESS?

## STATEMENT OF CASE

A pre-trial evidentiary hearing was held in the District Court to determine whether the delay of four years in the prosecution of the case violated the Constitution and thereby required dismissal. Appellant's motion was based on the grounds that appellant had the due process right not to be deprived of his ability to defend himself; that the Sixth Amendment right to be free of hardship and anxiety which results from lengthy and uncertain delays was violated; and that the trial court under its broad power granted by Federal Rule of Appellate Procedure 48(b) should dismiss.

The trial court based its denial of the motion to dismiss on the absence of a sufficient showing of actual prejudice. The trial court noted that the evidence at trial would be based on documents and that appellant had ample opportunity to re-

fresh his memory from such documents. The Court of Appeal, in affirming the District Court, noted that appellant failed to demonstrate that any important witnesess or documents were not available at trial.

During trial, appellant's counsel, through extensive cross-examination of prosecution witnesses and by ample defense testimony, clearly indicated to the judge and jury that the government failed to prove the criminal intent required by Section 1010 of Title 18, United States Code. On appeal to the Court of Appeals, appellant clearly showed that the government's case was based solely on evidence that a false statement had been made on the credit application. Citing case authority which required a showing of both knowledge that the statement was false and that the statement was made for the purpose of obtaining a loan, with the intent that the loan be insured by the Federal Housing Administration, appellant argued on appeal that he was denied a fair trial in that there was a total absence of the

required proof that he knew the statement was false and that he possessed the necessary intent.

The Court of Appeals concluded that appellant's failure to note on the loan application four outstanding loans supported the conclusion that he possessed the requisite intent to support his conviction.

The trial court proceeded immediately to sentence appellant following the verdict. No presentence report was obtained to guide the court in its discretion. On appeal, appellant argued that he was denied fundamental fairness at the sentencing hearing not only because the court acted without the aid of a presentence report, but because the court expressed a personal bias towards appellant, considered improper matters in determining sentence; offered appellant no opportunity to prepare for sentencing; and delegated its duty to provide a fair hearing to appellant's counsel, who waived the necessity for a presentence investigation and urged the court to proceed.

The Court of Appeals concl uded that the District Court's questioning of appellant and his counsel elicited the necessary information to support its determination of sentence.

REASONS FOR ALLOWANCE OF WRIT

Delay Violated Due Process:

Appellant contends that the Court of Appeals failed to fairly consider the totality of the circumstances and that appellant had adequately demonstrated that no witness at trial could remember the events and this loss of memory amounted to unavailability.

The Court of Appeals failed to apply the balancing test set forth in Barker v. Wingo (1973) 407 U.S. 514, which had been held applicable under Federal Rule of Appellate Procedure 48(b). United States v. Infanti CA NY (1973) 474 Fed. 2d 522. The court noted that appellant failed to show any actual prejudice. Appellant contends that this consideration failed to consider the other elements set forth in the balancing test; and further, that appellant had shown actual prejudice

to his trial when none of the witnesses, either prosecution or defense, could remember the details surrounding the execution of the documents. It was appellant's burden to explain and defend against what the documents purportedly showed. In order to do this, he had to rely on his memory and the memory of the other persons involved in the transaction. Because of the inordinate pre-indictment delay of four years, he was unable to rely on his own memory, and as the trial transcript shows, none of the persons involved could remember the transaction. As a direct result of the delay and the fading memories that result with the passage of time, appellant was without any defense.

United States v. Marion (1971) 404 U.S. 307 recognized that the due process clause provides a basis for dismissing an indictment if the defense can show at trial that the prosecutorial delay has prejudiced the right to a fair trial. Appellant contends that the failure of the trial court to grant his pretrial motion to dismiss for

unreasonable pre-indictment delay violated his right to a fair trial. He was actually prejudiced in two aspects by the delay in indictment: he was denied due process in that he had no opportunity to prepare or present any defense and he was denied his ri ght to effective cross-examination of government witnesses (i.e., none of the witnesses could recall the events surrounding the execution of the documents.)

Intent Was Not Proven:

Section 1010 of Title 18, United States Code, is clear in its requirement of proof of a criminal intent. The Court of Appeals erred in its decision that appellant's failure to note on the application four outstanding loans supports the conclusion that he possessed the required intent. "It is not sufficient to prove guilt to show that defendant signed a document with an untruthful statement... the burden is on the government to prove his knowledge of its falsity and his criminal intent." CIT Corporation v. United States of America

CA Wash (1945), 150 Fed. 2d 84, at 93.

There was no direct evidence proving intent, and no circumstantial evidence which would support a reasonable inference that appellant criminally intended to make a false statement in order to obtain the loan.

Sentencing Procedure Denied Fairness:

The Court of Appeals, in its ruling regarding the sentencing, only discussed the lack of a presentence report. Appellant's brief presented several errors allegedly made by the trial court: the trial court expressed a personal bias toward appellant; considered improper matters in determining sentence; failed to allow adequate opportunity to prepare for sentencing; and permitted counsel for appellant to proceed to sentencing in the absence of any guides before the court.

The Court of Appeals stated that the absence of the presentence report was due to appellant's lack of cooperation. The transcript clearly revealed that it was appellant's counsel's decision not to prepare the presentence report prior to

verdict. Appellant should not be penalized in any manner by the trial strategy of counsel.

The case of United States v. Manuella (1973) CA NY 478 Fed 2d 440, discussed the importance and effectiveness of a presentence report and states that dispensing with such report should be done rarely and then only for good cause. Appellant notes that the sentencing followed immediately the verdict solely because appellant's counsel desired to return to California. The trial court attempted to substitute for the assistance of a presentence report its own questioning of counsel and appellant. This was not sufficient to enable the court to properly exercise its discretion. As noted in Manuella, although the court may elicit mitigating factors at the hearing, if such factors were presented via a presentence report and by a defendant fully prepared and free of the strain of trial, these factors would have been given more consideration.

Appellant was denied effective assistance of counsel at his hearing in that his counsel lacked knowledge of the procedure; failed to provide an

alternative method by which the probation department could provide a presentence report; and permitted sentencing to proceed in the absence of a presentence report, although the trial court had indicated several times the need for such a report.

A review of the sentencing transcript reveals that the trial court spent a great deal of time discussing appellant's sexual behavior. "The appellate court may scrutinize the sentencing process to insure that the trial judge based his decision on reliable information." Townsend v. Burke (1948) 334 U.S. 736. The trial judge's remarks at the time of sentence, expressing his concern over appellant's sexual behavior, were so fraught with personal bias as to constitute a denial of due process.

The only facts before the court were that appellant was a veteran, had a family of three, had no prior criminal record, and was a Christian man who found himself in debt and made a mistake. There is nothing in the record which would

support a finding that appellant would successfully complete a probatio nary term; nothing to indicate that rehabilitation could more easily be attained by probation; and nothing to indicate his present status as to employment and future plans.

Appellant contends that his application for probation was not fairly considered by the Court in the absence of a presentence investigation and othe r reliable information.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Nicholas G. Demma
Counsel for Petitioner

# APPENDIX "A"

FILED

July 25, 1975

John P. Hehman,
Clerk

Number 74-1215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF
AMERICA,

Plaintiff-Appellee,

ORDER

v.

JACK B. COMBS,

Defendant-Appellant

/

Before: EDWARDS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

On May 14, 1973, Appellant was convicted in District Court of falsifying an application for an FHA guaranteed loan in violation of 18 U.S.C. §1010. Appellant brings this appeal urging that he was denied due process by the passage of four years between commission of the crime and his

indictment; that there was insufficient evidence at trial upon which his conviction could be based; that the District Court abused its discretion by admitting copies of the loan application and related documents; and that the sentencing procedure violated his due process rights.

Appellant's crime was not such as would put the government on notice immediately. Once the government discovered that the loan application contained falsehoods, it took speedy action in prosecuting Appellant. In any event, Appellant has completely failed to demonstrate that any important witnesses or documents were not available at the time of trial.

In viewing the evidence at Appellant's trial most favorably from the standpoint of the government, United States v. Kubeck, 487 F. 2d 1256, 1258-1259 (6th Cir. 1973), Appellant's failure to note on the loan application four outstanding loans supports a conclusion that he possessed the requisite intent to support his conviction.

Admission of copies of the loan application

and related documents, which the bank kept in the regular course of its business, the authenticity of which were verified by bank officials, did not violate the hearsay rule.

Finally, the District Court questioned Appellant and his counsel and elicited information which would have been contained in a presentence report. Such report was not available because Appellant refused to cooperate. His lack of cooperation was offset by the District Court's effective questioning.

Upon due consideration of the record, briefs and argument of counsel,

IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By /s/ Grace Keller
Chief Deputy

FILED
September 15, 1975
John P. Hehman,
Clerk

Number 74-1215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ORDER

JACK B. COMBS,

Defendant-Appellant.
_____/

Before: EDWARDS, CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk